80-1580

No.

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IN THE

Supreme Court of the United States

October Term, 1980

LINCOLN UNIVERSITY, et al.,

Petitioners,

v.

C. JAMES TROTMAN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. Freedley Hunsicker, Jr.
Francis J. Connell III
Cynthia J. Giles
Drinker Biddle & Reath
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Attorneys for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Do state-related university faculty members who claim that they were unlawfully retaliated against for exercise of their First Amendment freedoms carry the burden of proving that their expressive activities were not so disruptive that they were outside First Amendment protection?

2. Are the memoranda and letters of a university president in which he expresses disapproval of faculty conduct properly subject to "prior restraint" and "chilling effect" treatment?

3. Did the Court of Appeals err in failing to require a balancing of interests in determining whether allegedly "chilled" speech is protected?

4. Is the subjective perception by certain faculty members of a "repressive atmosphere" a sufficient basis for the intervention of the federal courts in the day-to-day administration of a university through the imposition of "judicial censure"?

PARTIES BELOW

In the Court of Appeals, appellants were: C. James Trotman, Mary Farrell, Andrew Murray, Virginia Gunn, Thomas Jones, Julius Bellone, Deforest Rudd, Peter F. Hoffer, Donald Pierce, Richard Winchester, William T. Johnson, Edward B. Groff and Leland Smucker. The named appellees were: the Board of Trustees of Lincoln University of the Commonwealth System of Higher Education, Lincoln University of the Commonwealth System of Higher Education, and Herman Branson, individually and as President of Lincoln University. The District Court held that the Board of Trustees was not an entity that could be sued as such and that holding was not appealed. App. A3.

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OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 635 F. 2d 216 and is reproduced at pp. A1-A30 of the separately bound appendix to this petition ("App."). The unreported opinion of the District Court for the Eastern District of Pennsylvania is reproduced at App. A31-A82.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on November 25, 1980. App. A83-A84. The Court of Appeals denied a timely Petition for Rehearing En Banc on December 19, 1980. App. A85-A86. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U. S. Const., amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Lincoln University, the country's oldest college for the higher education of black students, is a state-related educational institution located in Pennsylvania. The controversy that gave rise to this litigation has its roots in Lincoln's change in status in 1972 from a private to a state-related institution and the University's subsequent efforts to increase its student-faculty ratio.

Guidelines promulgated by the Pennsylvania Department of Education, applicable to Lincoln when Lincoln became state-related in 1972, set a ratio of 20 students to 1 faculty member; Lincoln's student-faculty ratio was 12 to 1. An increase in the ratio would, of necessity, have required significant reductions in the size of the Lincoln faculty. Dr. Herman Branson, who was appointed as the President of Lincoln University in 1970, was directed by the University's Board of Trustees to take action to reach a student-faculty ratio of 20 to 1 by September, 1978.

Accordingly, Dr. Branson advised the relevant faculty committee that he intended to send "retrenchment notices"[1] to all faculty members so that the University would be in a position to terminate sufficient faculty to meet both the Pennsylvania guidelines and the Board of Trustees' directives. The faculty refused to cooperate. Certain faculty members, including some of the plaintiffs, instead voted to censure Dr. Branson and wrote to the Governor of Pennsylvania demanding that he replace Dr. Branson. When Dr. Branson and the University administration did not retreat from the retrenchment plan, a "cadre of faculty dissidents . . . embarked on a campaign of intimidation, obstruction, harrassment and personal vilification in order to accomplish their stated objective

1. The "retrenchment notices" were notices of termination sent because of economic necessity pursuant to a faculty by-law requiring that each faculty member be given one year's notice before termination. *See,* App. A5, A39-A40.

of ousting the President and some or all members of the Board of Trustees".[2]

Dispute over the necessity for faculty reduction[3] was at the center of the friction between the plaintiffs and the University. However, plaintiffs' "campaign" to oust the President also included protests on other "issues." One of these involved the position of chair of the English Department. In 1977, Dr. Gladys Willis was appointed Chairperson of the English Department, replacing plaintiff C. James Trotman. Certain members of the Department faculty, led by Mr. Trotman, "refused to recognize" Dr. Willis as the Department head and vigorously objected to her assignment of courses among the English Department faculty. Opposition to Dr. Willis took the form of attempts to censure her at faculty meetings, circulation of various memoranda about her qualifications and methods, and disruptive demonstrations in her classroom that ultimately resulted in the arrest of Mr. Trotman and another faculty member who refused to leave the classroom when requested to do so by University police.[4]

Another issue that was the subject of considerable protest by plaintiffs was the non-renewal of James Trotman's employment contract. Mr. Trotman had never earned a doctorate in his subject matter field—a prerequisite for tenure. Under the collective bargaining agreement, Mr. Trotman would have automatically received tenure in 1978

2. Transcript of the District Court's oral opinion, App. A80. The "cadre" referred to in the District Court opinion consisted primarily of the plaintiffs in this case. For a more complete discussion of the history of the student-faculty ratio dispute, see the District Court opinion, App. A38-A41.

3. The dispute centered on the necessity for faculty reduction rather than the means by which such reduction could be accomplished because the faculty, feeling that no reductions were necessary, refused to cooperate with the Administration in implementing the Board's directives. See, District Court opinion, App. A40-A41.

4. A more complete discussion of incidents regarding Dr. Willis is set forth in the District Court opinion, App. A42-A46.

if he did not receive a notice of non-renewal. Mr. Trotman claimed that his dismissal was in retaliation for his outspoken criticism of Dr. Branson and the Administration. The District Court found, and its finding was not overturned on appeal, that Trotman's contract was not renewed because of his failure to satisfy the tenure requirement.[5]

Plaintiffs also protested the "retirement" of Edward Groff; Dr. Groff claimed that his "retirement" was in retaliation for his criticism of Dr. Branson. After undergoing brain surgery and being approved for total disability insurance, Dr. Groff received a letter from Dr. Branson acknowledging Groff's retirement disability. Upon receipt of this letter Groff wrote a number of accusatory letters to the Trustees by which Dr. Branson was informed that Dr. Groff had intended to be placed on sick leave rather than retirement. A short time later Dr. Groff was placed on disability leave status as he desired.[6]

The opposition of plaintiffs to defendants' positions on these issues and to Dr. Branson personally was both outspoken and extensive. The major vehicles for communication of plaintiffs' vehement disapproval of President Branson were two organizations: Friends of Lincoln University ("F. L. U."), and the Faculty Action Committee, both of which had as their goal a new President for Lincoln University.[7] Plaintiffs, individually and in groups, pro-

5. See, District Court opinion, App. A47-A55. Pursuant to the by-law provision mentioned in footnote 1 at p. 2, *supra*, Mr. Trotman had to receive notice of the non-renewal of his employment contract one year before its effective date. If the University did not give Mr. Trotman such notice, he would have automatically received tenure under the collective bargaining agreement by virtue of his length of employment at Lincoln.

6. See, District Court opinion, App. A59-A60. Other subjects of plaintiffs' protests are set forth in detail in the opinion of the District Court, App. A55-A66.

7. See, District Court opinion, App. A35 and A40. The plaintiffs in this case were the active members of these two organizations and also were active members of the faculty union; each of the plain-

tested University actions by various means including: 1) picketing on five separate occasions: twice on campus, once at the office of the acting Board Chairperson and twice outside the law offices of the counsel to the University; 2) demonstrating in the classroom of Dr. Willis during scheduled class time; 3) repeatedly raising the disputed issues for discussion and making motions to censure Dr. Branson and Dr. Willis at faculty meetings; 4) calling "divisional meetings" to censure Dr. Willis; 5) holding "alternative" convocations; 6) speaking at meetings of and writing letters to the Board of Trustees; 7) distributing flyers on the campus; 8) sending "open" letters and telegrams to public officials,[8] and to editors of local publications advocating the ouster of President Branson; 9) seeking the censure of Lincoln University by the American Association of University Professors; 10) circulating copies of letters written by plaintiffs to President Branson critical of him and his policies; and 11) distributing memoranda to the faculty. Testimony was taken at trial with regard to in excess of 100 memoranda, letters, minutes of meetings and other documents containing strong criticism of Dr. Branson or his policies.

Plaintiffs' activity culminated in the filing of this lawsuit in the Federal District Court for the Eastern District of Pennsylvania in June of 1978.[9] The jurisdiction of the

7. (Cont'd.)

tiffs who testified was an officer of the faculty union, the Lincoln University Chapter of the American Association of University Professors, or a member of one of its committees. App. A35.

8. In a telegram to the Governor of Pennsylvania, plaintiff Johnson, seeking Branson's removal as President, accused Branson of "terribly irrational and destructive" conduct and characterized him as "inhumane", "vicious", "vindictive" and "arrogant with power given him by a weak Board." District Court opinion, App. A71-A72.

9. One of the plaintiffs stated in a press interview that this lawsuit was part of plaintiffs' campaign against President Branson: "I

District Court was invoked under 28 U. S. C. § 1331 (general federal question jurisdiction) through the allegations of plaintiffs that defendants violated plaintiffs' First Amendment rights by retaliating against them for their criticism of University policy and by otherwise infringing their right to freedom of speech.

The actions of defendants that plaintiffs complain of include: 1) the non-renewal of James Trotman's contract; 2) the temporary "retirement" of Edward Groff; 3) the arrest of James Trotman; 4) the removal of W. T. M. Johnson as chairperson of the Chemistry Department; 5) the sending of letters from President Branson to various individual plaintiffs calling them to task for attempting to censure colleagues at faculty meetings, for making inaccurate statements to the press and for circulating confidential faculty evaluations to the entire faculty; and 6) the sending of a telegram to various individual faculty members notifying them that the University regarded picketing to be in violation of the collective bargaining agreement and grounds for discipline.[10]

The District Court, sitting without a jury, granted defendants' motion to dismiss at the conclusion of plaintiffs' case, holding that most of the plaintiffs had not established that their expressive activity was a substantial

9. (Cont'd.)

think if we can win a federal court case against [Branson] there's a better chance we can get rid of him. In the long run that is what we want." Record filed with the Court of Appeals, Vol. V, at 1315a-1317a.

10. The District Court found that the telegram was sent because of the University's good faith belief, based on prior picketing practices of plaintiffs, that the picketing would be over matters subject to the exclusive grievance procedures of the collective bargaining agreement and the University's By-Laws. The District Court also found that none of the plaintiffs was deterred from picketing by the telegram. App. A64. A more extensive discussion of plaintiffs' complaints may be found in the opinion of the Court of Appeals, App. A6-A14.

factor in any actions taken by the University, and that the other plaintiffs had not shown that their expressive activity was protected. The District Court also found that there was no intent by the defendants to chill or in any way inhibit the constitutionally protected activities of the faculty members and that, as a matter of fact, none of the plaintiffs was inhibited from engaging in expressive activity. App. A76-A77. Plaintiffs appealed to the Court of Appeals, which vacated and remanded the case for further consideration.

The Court of Appeals divided its analysis into two sections corresponding to the two types of allegations made by plaintiffs: 1) plaintiffs who felt that some specific action taken with regard to them personally was in retaliation for their speech or conduct; and 2) plaintiffs who, while not allegedly "retaliated" against, felt that there was a "repressive atmosphere" on the Lincoln campus. In the section discussing the "retaliatory action" claims, the Court of Appeals attempted to apply the analysis set forth in *Pickering v. Board of Education*, 391 U. S. 563 (1968) and its progeny. However, the Court of Appeals improperly remanded on the basis of dicta in the District Court opinion and, in so doing, gave instructions to the District Court on the allocation of the burden of proof that are in conflict with the decisions of this Court.

The second section of the Court of Appeals' analysis dealt with those claims that were based on letters sent by the President of Lincoln to individual plaintiffs commenting on activities in which such plaintiffs had already engaged; plaintiffs claimed that these letters inhibited them from exercising their First Amendment freedoms. The District Court found that such informal communications neither were intended to *nor had the effect of* inhibiting plaintiffs' freedom of speech.[11] Nevertheless, the Court of Appeals reversed and remanded on the basis that the

11. App. A77, A81.

District Court had applied neither "prior restraint" nor "chilling effect" analysis.

Petitioners herein, defendants below, seek a writ of certiorari to the United States Court of Appeals for the Third Circuit, and a reversal of the decision of that Court, for the reasons stated below.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has upset the delicate balance between freedom of speech and the efficient administration of public institutions that has been carefully developed by this Court.[12] This balance encourages the dialogue and free exchange of ideas that are protected by the First Amendment while not permitting expression that is so disruptive that it undermines the ability of the public institution to provide the service for which it was founded. The result of the Court of Appeals' departure from the principles enunciated by this Court will be the replacement of the dialogue between faculty and administration with a monologue by dissident faculty members who need no longer concern themselves with the impact of their behavior on the university's ability to fulfill its educational mission.

In addition, the decision of the Court of Appeals in this case concerning the alleged "repressive atmosphere" at the University will have a serious and immediate detrimental impact on the administration of state-related educational institutions. The Court of Appeals' unwarranted extension of "prior restraint" and "chilling effect" analysis to informal communications between public employers and employees will effectively stifle the university administration's freedom to express disagreement with or disapproval of faculty members' criticism of or personal attacks on university administrators, no matter how disruptive or inaccurate those attacks might be. If every memorandum or letter from an administrator to an individual faculty member questioning or disagreeing with that faculty member's conduct may be the basis for federal litigation, the university's educational mission will be bogged down in a morass of lawsuits in which faculty

12. It is very important to note, in weighing the impact of the Court of Appeals decision, that the constitutional principles articulated in that decision apply not only to state university administrators but also to all other public employers.

members seek to vindicate personal opinions and intimidate administrators with whom they disagree. The Court of Appeals' approval of the federal district courts as a forum for "judicial censure" will likely result in innumerable suits seeking nothing more than judicial sanction for one side of what are essentially internal disagreements about administrative or educational policy.

The Court of Appeals opinion not only contains principles of potentially disastrous implications for state-related universities, and, indeed, all public employers, but also contains four substantial errors of law that bring the Court of Appeals into conflict with the governing decisions of this Court as well as the decisions of other courts of appeals. Each of these holdings will severely and improperly restrain university administrators in the efficient performance of their duty to provide educational services, and cumulatively they will effectively stifle expression by administrators seeking to carry out their educational mission, to the ultimate detriment of students and faculty alike.

1. The Court of Appeals found, in conflict with decisions of this Court, that disruptive expressive activity was nonetheless protected by the First Amendment.

This Court has consistently stated, and the Court of Appeals in this case held, that the examination of a teacher's claim of retaliation based on engagement in protected activity requires a three step process. First, the plaintiff must show that he engaged in protected activity. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U. S. 274, 287 (1977). Second, having established by a preponderance of the evidence that his speech is constitutionally protected, plaintiff must then prove, again by a preponderance of the evidence, that the protected conduct played a substantial part in the employer's allegedly retaliatory action. *Id; Givhan v. Western Line Consolidated School District,* 439 U. S. 410, 416 (1979). Only if

plaintiff has carried his burden of proof on the first two points need the court go on to address the third: whether defendant can demonstrate that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy,* 429 U. S. at 287.

The District Court, at the conclusion of plaintiffs' case, found that, as to their "retaliatory action" claims,[13] plaintiffs had failed to show that they had engaged in protected activity and also failed to establish that any such allegedly protected activity was a substantial factor in any decisions made by the defendants. The Court of Appeals' decision to vacate and remand this portion of the District Court's opinion was based in large part on an improper allocation of the burden of proof, in direct conflict with the decisions of this Court.[14]

As stated in *Pickering v. Board of Education,* 391 U. S. 563, 568 (1968), the question of whether the faculty member's speech is constitutionally protected necessarily entails striking a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In an educational setting, the State's interest in promoting efficiency and maintaining the proper atmosphere for learning and teaching warrants consideration of the manner in which plaintiffs'

13. The actions of defendants that plaintiffs claim were in retaliation for plaintiffs' expression include the non-renewal of James Trotman's employment contract, the "retirement" of Edward Groff, the removal of W. T. M. Johnson from the Department Chairmanship and the arrest of Trotman. See, App. A6-A9.

14. The Court of Appeals also based its reversal on a disagreement with dicta in the District Court opinion about the allocation of burdens in the third step of "retaliatory action" analysis. As plaintiffs failed to carry their burden on the first two elements of proof, dicta of the District Court was not relevant to plaintiffs' appeal to the Court of Appeals and therefore not a proper basis of reversal. See, discussion at page 14, *infra.*

speech is expressed and whether such speech presents a question of maintaining discipline by immediate superiors or harmony among co-workers. *See, Pickering,* 391 U. S. at 570 and *Givhan v. Western Line Consolidated School District,* 439 U. S. 410, 415 (1979). The disruptive effect of plaintiffs' speech is therefore a factor to be weighed in the *Pickering* balance in determining whether the speech in question is protected. *Plaintiffs* must meet their burden of proof by establishing that their expressive activity is protected, as the Court of Appeals recognized. However, the Court of Appeals appeared to conclude that it was not necessary to engage in the *Pickering* balance in deciding whether the speech was protected; the Court stated that the seriously disruptive actions of plaintiffs may rather be in the nature of an excuse for defendants' actions after plaintiffs establish only that their conduct involved speech.[15] This analysis is in direct conflict with *Pickering* and its progeny.

If plaintiffs' expressive activity is disruptive or otherwise substantially interferes with the primary mission of the educational institution, then it is outside the protection of the First Amendment. Where, as here, the trial court finds that the activity was disruptive, plaintiffs have failed to carry their initial burden of proof on the question of whether their conduct is protected. In the absence of protected conduct no First Amendment claim can be made out.

The Court of Appeals flatly stated, despite the District Court's findings of disruption, that it "seems too evident to require any discussion" that "much of the

15. "[D]efendants must be given their opportunity to show that plaintiffs' speech and actions in this dispute fell within the range of conduct which has been held to justify administrative sanctions." Court of Appeals opinion, App. A25. In addition to incorrectly allocating the burden of proof, this statement of the Court of Appeals inexplicably ignored the clear finding of the District Court that the conduct of plaintiffs was in fact so disruptive that it was outside the protection of the First Amendment. Court of Appeals opinion, App. A27, and District Court opinion, App. A69, A77 and A80.

activity engaged in by plaintiffs falls within the protection of the First Amendment".[16] Certainly, as the Court of Appeals noted, expressive activity is not necessarily removed from protection merely because it is "strident" or "misguided". However, the District Court found, as a fact, that the tactics employed by the plaintiffs as a group "unquestionably had a disrupting effect on the University's primary mission—education and the advancement of the Arts and Sciences",[17] and that the activities of some individual plaintiffs were so disruptive within their own departments that they could not be given constitutional protection.[18] Despite those findings of fact, the Court of Appeals inexplicably remanded the case to the District Court to give defendants an "opportunity to show that plaintiffs' speech and actions in this dispute fell within the range of conduct which has been held to justify administrative sanctions."[19]

By so doing, the Court of Appeals, in effect, shifted the burden of proof to defendants on the question of whether plaintiffs' speech was protected and ignored a finding of fact by the District Court that had substantial support in the record and that was not found to be clearly erroneous by the Court of Appeals.[20] Such an interpre-

16. Court of Appeals opinion, App. A16.

17. Court of Appeals opinion, App. A27; District Court oral opinion, App. A80.

18. See, District Court opinion, App. A69, A72. Note that as to the majority of individual plaintiffs' retaliatory action claims the District Court held that such plaintiffs failed to show that their conduct was a substantial factor in the allegedly retaliatory action. See, App. A69, A72-A77.

19. Court of Appeals opinion, App. A25.

20. The principle that plaintiffs must prove their case and that plaintiffs' burden of proof may not be shifted to defendants has been acknowledged by this Court in many contexts, most recently in *Texas Department of Community Affairs v. Joyce Ann Burdine*, 49 U. S. L. W. 4214 (March 4, 1981). The reasoning of this Court in *Burdine* would also compel the reversal of the Court of Appeals de-

tation plainly is in conflict with *Pickering* and cases subsequently decided thereunder.

The Court of Appeals also disagreed with the District Court's statement that where plaintiff alleges retaliation, "[t]he ultimate burden will be on the plaintiff to show not merely that impermissible factors entered into the retaliatory decision or action, but also that 'but for' the protected conduct the action would not have been taken." App. at A27. As has been discussed above, this step of the analysis is reached only after plaintiffs have shown: 1) that their speech was protected, and 2) that any protected speech was a substantial factor in the allegedly retaliatory action taken by defendants. The District Court's holding rested squarely on a finding that plaintiffs failed to meet their initial burden of proof. Any dicta about the allocation of burdens that would be applied had plaintiffs met their burden of proof is completely irrelevant to the holding of the case and therefore an inappropriate basis for reversal. The Court of Appeals' decision to reverse the District Court on the retaliatory action claims is therefore clear error and should be corrected by this Court.

2. **In directing the application of "prior restraint" and "chilling effect" analysis to informal memoranda and letters from university administrators to faculty members, the Court of Appeals departed significantly from principles promulgated by this Court in a manner that will prohibit expressive activity by university administrators.**

The Court of Appeals, in stating that prior restraint analysis should be applied to defendants' individual and ad hoc responses to discrete instances of misconduct by

20. (Cont'd.)

cision on the allocation of the "but for" burden. *See also, Givhan v. Western Line Consolidated School District*, 439 U. S. 410 (1979) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).

plaintiffs,[21] went far beyond any holding of this Court and in so doing has effectively muzzled any response by administrators of state-related educational institutions to criticism from faculty members.

The analysis of the Court of Appeals applies to all public schools and state-related educational institutions and, in effect, tells the administrators of those institutions that they may *never* warn teachers of improper or inappropriate behavior. Worse, the Court of Appeals opinion prohibits university administrators from even criticizing or disagreeing with their faculty members. If all such warnings and expressions of disagreement are to be construed as prior restraints, requiring a compelling state interest to justify them, this is tantamount to saying that no warnings or even strongly worded responses may be given, and that administrators respond at their peril to attacks by teachers.

A distinction is drawn in the Court of Appeals opinion between the analysis to be applied in situations where some allegedly retaliatory action was taken and where there was an exchange of correspondence but no action was taken. "[W]e must first note the significant difference in legal treatment which must be accorded plaintiffs' claim of unconstitutional restraint and plaintiffs' claims of retaliatory actions." Court of Appeals opinion, App. A24. With a passing acknowledgment to the cases that hold that conduct that impairs the efficiency of public service may be unprotected, the Court of Appeals goes on to say that:

> "On the other hand, no case has held that any justification can be offered with respect to actions taken to suppress or prevent criticism. (footnote omitted) It has always been recognized that there is a vast difference between state action which can be considered a form of prior censorship and action which holds the individual responsible once the speech or activity is concluded."

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21. Court of Appeals opinion, App. A25.

Court of Appeals opinion, App. A25, citing *Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

Prior restraint has traditionally been defined as a predetermined judicial prohibition restraining specified expression.[22] The "classic mold" of prior restraint involves a "prior injunction against publication".[23] Before "prior restraint" analysis is appropriate it must be shown that official sanctions may be imposed merely for violation of the order that constitutes the restraint without regard for the lawfulness or protected nature of the underlying expression that is asserted to be unlawful,[24] or that a public officer has the authority to prohibit speech based on its content.[25]

The Court of Appeals here directed the District Court to apply prior restraint analysis to defendants' specific, ad hoc, *after-the-fact* protests against certain conduct by specific faculty members. Such protests clearly are not appropriate for prior restraint treatment. They were not judicial orders, nor were they administrative orders. They

22. *See, Nebraska Press Association v. Stuart*, 427 U. S. 539 (1976); *Near v. Minnesota*, 283 U. S. 697 (1931); *Bernard v. Gulf Oil Co.*, 619 F. 2d 459 (5th Cir. 1980), *cert. granted*, 101 Sup. Ct. 607 (1980); *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U. S. 912 (1976); Litwack, *The Doctrine of Prior Restraint*, 12 Harv. C. R.-C. L. Rev. 519, 520 (1977). Orders of administrative agencies may also be subject to prior restraint analysis. *See, Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U. S. 167 (1976).

23. *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97, 101 (1979).

24. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U. S. 912 (1976); *Bernard v. Gulf Oil Co.*, 619 F. 2d 459 (5th Cir. 1980), *cert. denied*, 101 Sup. Ct. 607 (1980); *Herschkop v. Snead*, 594 F. 2d 356, 368 (4th Cir. 1979).

25. *See, e.g., Brown v. Glines*, 444 U. S. 348 (1980).

were, at most, statements of the President's view that activities in which plaintiffs had already engaged may be considered grounds for discipline. No consequences followed from his statement of his view. The affected faculty were free to disagree and, in fact, did disagree quite vigorously. Most importantly, they were not, by the receipt of the President's letters, restrained from raising as a defense to any disciplinary action under the collective bargaining agreement, an argument that their speech or conduct was constitutionally protected.

As the Court of Appeals acknowledged, once the label of "prior restraint" is attached to the challenged action, it may be constitutionally permissible only in "exceptional" cases.[26] In holding that ad hoc expressions of disagreement with faculty or individual warnings to them with regard to their misconduct may be labeled prior restraints, the Court of Appeals has, in effect, held that the state as employer may not protect its interest in the efficient functioning of its educational institutions. If this analysis is permitted to stand, educational administrators will be unable to carry out even the most routine internal operating procedures and daily personnel affairs. Criticism of, or even a response to, a faculty member's actions will, under the Court of Appeals' analysis, be construed as an unconstitutional prior restraint. The Court of Appeals opinion will thus inhibit the free and lively exchange of ideas that the First Amendment was designed to encourage.

The Court of Appeals additionally found that the President's communications with the faculty should be ex-

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26. *Near v. Minnesota*, 283 U. S. 697, 716 (1931). Indeed, it may be that prior restraints, under current law, may only be justified, if at all, in cases of obscenity (*Freedman v. Maryland*, 380 U. S. 51 (1965)) or direct, immediate and grave harm to life or national security (*New York Times Co. v. United States*, 403 U. S. 713 (1971) (*per curiam*)).

amined for their "chilling effect".[27] The Court's extension of "chilling effect" analysis beyond formal statutes, regulations or rules would result in a serious interference in the administration of educational institutions and would involve the federal courts in the constant examination of informal memoranda and letters written to address issues of university policy or to express personal opinion. University administrators will be unable to rebut or even comment on the inappropriate or disruptive behavior of the faculty without inviting a federal lawsuit because the recipient of the criticism now feels intimidated from continuing in his behavior.

The chilling effect label is used in two situations: 1) to permit a plaintiff who has not been sufficiently injured under traditional notions of standing to seek a declaratory judgment that expressive activity in which the plaintiff

27. The Court of Appeals opinion reflects considerable confusion on the meaning and use of the concepts of "prior restraint" and "chilling effect". This confusion appears to stem from a failure to differentiate between these words as terms of art and their facial meaning. "Chilling effect" analysis is distinguished from "prior restraint" analysis in that the latter is the label used to describe situations in which punishment may be imposed without an opportunity for a ruling on whether the restriction on speech is constitutional or in which the speaker is prohibited from speaking, not just punished after doing so. A "chilling effect", however, may exist where although there is an opportunity to raise the unconstitutionality of the sanction as a defense, the inhibition against speaking is great. While such a "chilling effect" may result in a failure to speak, and may therefore be considered a restraint prior to speaking, it is to be distinguished from formal "prior restraint" analysis. Likewise, all statutes or regulations that cannot pass constitutional muster because they restrict free speech may in some sense "chill" speech as that term is commonly understood. However, "chilling effect" as a term of art is a label used for analytical purposes to justify the creation of standing to challenge a statute or to refuse to give effect to a statute that is impermissibly overbroad or vague in a manner that may intrude upon First Amendment freedoms. The grant of certiorari in this case would be appropriate to clarify these concepts.

seeks to engage is improperly prohibited by a statute or regulation;[28] and 2) to allow a person to raise the overbreadth or vagueness of a statute or regulation to which that person is subject.[29] The doctrine was formulated to focus directly on the need for precision in legislative drafting to avoid conflict with First Amendment rights.[30]

It is for this reason that chilling effect analysis has been applied in decisions of this Court only to statutes, ordinances, rules, or regulations, not to the kind of ad hoc responses involved in this case.[31] This District Court found that plaintiffs in this case had not been disciplined nor had they suffered any damage as a result of receiving the allegedly inhibitory letters. There was no "policy" that could be examined for its overbreadth or vagueness. The District Court found, as a finding of fact, that plaintiffs were not inhibited from engaging in expressive activity. The Court of Appeals has not stated any reason why, in the absence of any injury to plaintiffs, the "chilling effect" doctrine should be extended to apply to the facts of this case.

As this Court observed in *Laird v. Tatum*, 408 U. S. 1 (1972), *rehearing denied*, 409 U. S. 901 (1972), in order to state a justiciable controversy on a theory that a governmental regulation has imposed a "chilling effect" on the

28. *See, e.g., Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965), and *Broadrick v. Oklahoma*, 413 U. S. 601, 612 (1973).

29. *See, e.g., Arnett v. Kennedy*, 416 U. S. 134 (1974), *rehearing denied*, 417 U. S. 977 (1974), and *Keyishian v. Board of Regents of the University of the State of New York*, 385 U. S. 589 (1967).

30. *See, The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845 (1970).

31. *See, e.g., Brown v. Glines*, 444 U. S. 388 (1980); *Arnett v. Kennedy*, 416 U. S. 134 (1974), *rehearing denied*, 417 U. S. 977 (1974); *Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548 (1973); *Broadrick v. Oklahoma*, 413 U. S. 601 (1973); *Grayned v. City of Rockford*, 408 U. S. 104 (1972).

plaintiff's expressive activity, more is required than mere allegations of a "subjective chill." On the contrary, in the cases in which plaintiffs have stated a constitutionally cognizable controversy, the challenged exercise of governmental power was "regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.*, at 11.

Moreover, the Court of Appeals' decision conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. Kurtz*, 600 F. 2d 984 (D. C. Cir. 1979).[32] In *Kurtz*, the D. C. Court of Appeals held that an action to declare unconstitutional a *formal memorandum* to all employees of an Internal Revenue Service office cautioning them not to disclose information about IRS activities did not present a justiciable case or controversy. The *Kurtz* court held that:

> . . . . [A]n official letter or memorandum, not promulgated through any rulemaking authority, should not lightly be deemed the foundation for a declaratory judgment to counter its "chilling" effect. 600 F. 2d at 988 (citations omitted).

The reasons for the development of the "chilling effect" doctrine simply do not support its extension to the facts of this case. The instructions of the Court of Appeals, requiring the District Court to apply "chilling effect" analysis, should therefore be reversed.

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32. Recent decisions of the Courts of Appeals for the Second and Seventh Circuits also incorrectly approve "chilling effect" analysis in cases of administrative responses to specific faculty members' expressive activity. *Aebisher v. Ryan*, 622 F. 2d 651 (2d Cir. 1980), and *Yoggerst v. Stewart*, 623 F. 2d 35 (7th Cir. 1980).

3. The result of the Court of Appeals' failure to require a *Pickering* balance in determining whether allegedly "chilled" speech is protected by the First Amendment, will be to require administrators to dismiss rather than warn employees when they fail to meet professional standards.

Even if chilling effect analysis were appropriate here, which it is not, for all of the reasons stated above, such analysis should still be subject to the balancing requirements articulated in *Pickering* and discussed above. The Court of Appeals here, in not requiring a *Pickering* balance, is in direct conflict with this Court as well as other courts of appeals.

It is at this point beyond question that a state-related educational institution has an interest in the efficiency of the services it provides that justifies greater restraints on faculty members' First Amendment freedoms than would be permissible in the absence of the employer-employee relationship. *See, Pickering v. Board of Education,* 391 U. S. 563 (1968). These interests are not lessened because the employer seeks to protect its efficiency without the necessity of firing the employee. Under the reasoning of the Court of Appeals, however, speech that may be unprotected under the *Pickering* analysis in a "retaliatory discharge" case, is somehow protected if the employer reprimands the employee rather than discharges him. We thus arrive at the absurd result of requiring administrators to fire disruptive employees rather than point out to employees their improper conduct in an attempt to remedy the problem short of dismissal.

The Court of Appeals stated that on remand the District Court should consider the "chilling effect" of defendants' actions but apparently concluded, as it did not find clearly erroneous the District Court's finding of disruption, that plaintiffs have no burden under the "chilling effect" analysis to prove that the allegedly chilled speech is protected under the *Pickering* balancing test. This is

contrary to the holding of other courts of appeals in similar cases, as well as contrary to reason.[33]

Two other courts of appeals that have specifically addressed the chilling effect argument in an employer-employee setting have stated that if a chilling effect analysis is appropriate, the district court must then engage in the *Pickering* balancing test to determine whether the "chilled" speech is protected, i.e., whether plaintiff has made out a First Amendment claim. See *Aebisher v. Ryan,* 622 F. 2d 651, 655 (2d Cir. 1980) and *Yoggerst v. Stewart,* 623 F. 2d 35, 39 (7th Cir. 1980). Where a disruptive effect of the expressive activity is shown, as it has been here, it is a somewhat startling result to hold that although the administrator may constitutionally discharge the employee in question, if the administrator instead warns the employee that continued disruption will be considered grounds for discharge, the administrator might then be found to have violated the employee's First Amendment rights.

As it is beyond question that the District Court found that plaintiffs' activities were sufficiently disruptive to remove them from the protection of the First Amendment,[34] the Court of Appeals has erred in its analysis of the law, an error that brings it into direct conflict with other circuits.

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33. The Court of Appeals opinion also states that the totality of defendants' conduct should be considered in evaluating plaintiffs' claims. It is clearly improper to weigh in this balance the conduct of defendants that has already been determined to be proper and not a basis for a First Amendment claim.

34. The District Court unequivocably stated that "the tactics employed by the plaintiffs unquestionably had a disrupting effect on the University's primary mission—education and the advancement of the Arts and Sciences." Court of Appeals opinion, App. A27. The findings were not held by the Court of Appeals to be clearly erroneous.

4. The Court of Appeals has sanctioned the intervention of federal courts in the day-to-day administration of a university, in contravention of the limitations of Article III, by approving the imposition of "judicial censure" and the granting of advisory opinions.

The decision of the Court of Appeals has provided a forum for the continual harassment of university administrators: faculty who disagree with administrative actions may, although otherwise unable to state a cause of action, seek "judicial censure" in the federal courts of allegedly unconstitutional conduct.[35]

In this case, the Court of Appeals has endorsed the exercise of the federal judicial power to censure what plaintiffs describe as a "repressive atmosphere." The District Court found that the Administration's actions were neither designed to, *nor had the effect of,* suppressing plaintiffs' freedom of expression.[36] Nevertheless, the Court of Appeals would permit plaintiffs to try to prove a purely subjective chill that they feel existed on the Lincoln campus.

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35. Opinion of the Court of Appeals, App. A16: "However, we do not view this case as primarily one by faculty members seeking reinstatement. Many of the plaintiffs are faculty members who are already tenured, who remain on the Lincoln faculty, and who do not seek action of the court to remedy a personnel decision. Even Trotman may be reinstated through the arbitrators' awards, if affirmed, without the need for any action by the federal courts. Therefore, this action may be viewed as one in which plaintiffs seek *judicial censure* of a course of conduct which they consider as having violated their constitutional right to engage in spirited criticism of administrative policies with which they disagree. Even if there were no claims seeking reinstatement or damages, plaintiffs' claims would be viable since suits for declaratory or injunctive relief have long been acknowledged to be effective means to protect free speech rights and redress their violation." (Emphasis added.)

36. App. at A77.

The Court of Appeals decision will involve the federal courts in the day-to-day management of the University despite the traditional reluctance of federal courts to intervene in conflicts that arise in the daily operation of the public schools.[37] The impact of the Court of Appeals opinion on the defendants in this case, for example, will undoubtedly result in a reluctance by administrators to rebut strident criticism addressed to them by faculty members. They will be unable to provide appropriate warnings to faculty members and other employees whose allegedly "expressive" activities disrupt the University's educational mission or violate its collective bargaining agreement. The Court of Appeals opinion will foreclose the administrators of public universities as well as other public employers from exercising their own expressive freedom.

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37. *See, Wood v. Strickland,* 420 U. S. 308, 326 (1975), *rehearing denied,* 421 U. S. 921 (1975), and *Epperson v. Arkansas,* 393 U. S. 97, 104 (1968). Plaintiffs' claims of constitutional infringement include decisions about tenure, promotions, department chairmanships and even what motions are appropriate for discussion at faculty meetings. Court of Appeals opinion, App. A14.

CONCLUSION

For all of the reasons discussed above it is appropriate for this Court to grant a writ of certiorari to the United States Court of Appeals for the Third Circuit and to correct that Court's errors of law that are in conflict with decisions of this Court and decisions of other courts of appeals and that will have disastrous effects on the ability of university administrators to meet their primary responsibility: the education of university students.

Respectfully submitted,

J. Freedley Hunsicker, Jr.
Francis J. Connell III
Cynthia J. Giles
Drinker Biddle & Reath
1100 Philadelphia National
Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700
Attorneys for Petitioners